STATE OF MICHIGAN

COURT OF APPEALS

ANGLERS, L.L.C., RHU D, L.L.C., and BRUGGE, L.L.C.,

Plaintiffs/Counter-Defendants-Appellees,

and

MICHAEL DEMIL,

Plaintiff-Appellee,

v

OAKRIDGE FARMS, L.L.C.,

Defendant/Counter-Plaintiff,

and

NICK KNUST,

Defendant,

and

RANDY RUSS,

Defendant-Appellant.

UNPUBLISHED
July 8, 2014

No. 309741
Macomb Circuit Court
LC No. 2010-001217-CK

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs Anglers, L.L.C., RHU D, L.L.C., Brugge, L.L.C., and Michael Demil brought this action against defendants Oakridge Farms, L.L.C. ("Oakridge"), Nick Knust, and Randy Russ for damages arising from Russ's alleged interference with a potential agricultural lease agreement between plaintiffs and Berville Farms, L.L.C. Oakridge filed a counter-complaint against the corporate plaintiffs for breach of contract. The trial court granted summary

disposition in favor of plaintiffs with respect to both their breach of contract claim against Oakridge and Oakridge's counterclaim for breach of contract. The court subsequently held a bench trial on the issue of damages for breach of contract and on plaintiffs' remaining claim for tortious interference with a business relationship or expectancy and on plaintiff DeMil's claim for assault and battery against defendant Russ. Following the trial, the court awarded the corporate plaintiffs $9,644.07 on their breach of contract claims against Oakridge, and $38,908.58 on their tortious interference claim against Russ only. It also awarded plaintiff Demil $1,000 on his assault and battery claim against Russ. Defendant Russ appeals as of right, challenging only the trial court's decision finding him liable for tortious interference with a business relationship or expectancy. For the reasons set forth in this opinion, we affirm.

In 2008, Oakridge entered into a lease agreement with RHU D for the Tubsprings Road/Capac Road property. The terms of the lease were memorialized in a Cash Farm Lease form, dated January 1, 2009, which the parties completed. The term of the lease was from January 1, 2008, to December 31, 2008. The lease included this provision:

> The term of this Lease shall be for a period of 1 year(s) beginning on 1-1-08 and ending 12-31-08. It is further agreed and understood that this lease shall continue in effect from year to year thereafter unless written notice to terminate is given by either party within one hundred eighty (180) days prior to the termination of this lease.

The lease states in a handwritten provision that "Cash rent for this farm is 20% of profit with a $100.00 Minimum (per acre)."

The parties executed the same Cash Farm Lease form for the Anglers property. The lease was dated October 10, 2008, and stated that the period of the lease was from January 1, 2009, to December 31, 2009. Anglers and Oakridge completed another Cash Farm Lease form on October 18, 2009, for the term January 1, 2010, to December 31, 2010, stating a per acreage rental rate of $50 an acre. Russ signed this form in a dual capacity as Anglers's agent and Oakridge's agent.

DeMil's entities and Oakridge entered into oral lease agreements for the Montgomery/Hough Road and Pratt Road farms for the 2009 crop year. Plaintiffs allege that the oral agreements included the same automatic renewal and 180-day notice of termination provisions as the written cash rent statements. In the spring or early summer of 2009, DeMil and Berville Farms's principal, DeBlouw, discussed leasing the four properties for growing Berville Farms's 2010 pumpkin crop. DeMil could charge a higher per-acreage rate to Berville Farms because vine crops deplete more minerals from the soil than field crops. According to DeMil, he discussed this plan with Russ in the summer of 2009. Russ testified at trial that he did not learn of the plan until August, which he opposed because he intended for Oakridge to lease the properties.

Plaintiffs' claim for tortious interference with a business expectancy is based, in part, on allegations that Russ directed Knust to spray the four properties with the herbicide Pursuit or another herbicide that contains chemicals that remain in the soil for nearly a year, or longer, after spraying. DeMil testified at trial that other persons in the area advised him that they saw

spraying equipment on the properties on or around November 15, 2009. DeMil hired an agronomist to test samples of the soil from the four properties. The agronomist collected samples from all four properties, but only tested one sample, from the Montgomery/Hough Road farm. The analysis did not reveal the presence of Pursuit, but DeBlouw was concerned that Russ might have sprayed another harmful chemical. DeBlouw could not afford testing for all potential harmful chemicals, and he decided not to assume the risk of losing a pumpkin crop if Russ had indeed sprayed a harmful herbicide.

Russ testified at trial that he sprayed the properties with glyphosate, the generic name for the herbicide patented by Monsanto and sold under the brand name Roundup. Glyphosate works on contact with the plant, not the soil, and does not leave a harmful residue. Russ testified that spraying glyphosate was consistent with his plans to raise corn or soybeans on the properties in the 2010 crop year.[1]

After defendants failed to pay rent due to plaintiffs under the 2009 leases by December 31, 2009, plaintiffs provided written notice in February 2010 that they were terminating the leases for the 2010 crop year. Plaintiffs also brought this action for breach of the lease agreements and for tortious interference with a business relationship or expectancy. Oakridge filed a counter-claim for breach of the 2010 leases. The parties moved for summary disposition with respect to the breach of lease claims. The trial court ruled that the leases were renewed for the 2010 crop year, stating, in relevant part:

> Russ indicated that payment for the 2009 crop year was not made because Anglers informed Oakridge that Oakridge could not farm the land in the 2010 crop year. [Russ's dep. at 35.] As addressed above, there is no evidence of a 180-day written termination notice. Since the clear and unambiguous contract language reflected the parties' intent to terminate only by such notice, Russ and Knust could not reasonably rely on any oral statement to terminate the 2009 lease. *Chestonia Twp* [*v Star Twp*, 266 Mich App 432; 702 NW2d 631 (2005)]. When Oakridge did receive a written termination notice in February 2010, Oakridge still owed 2009 rent. [Knust's dep. at 39, 75]. Therefore, it was Oakridge which first breached the 2009 lease by failing to pay rent for the 2009 crop year.

The trial court concluded that the circumstances of RHU D's and Oakridge's lease for the period January 1, 2008, to December 31, 2008, were identical to the Anglers lease with respect to the 180-day notice of termination and automatic renewal provisions. The court concluded that RHU D also was entitled to partial summary disposition on the breach of contract claim. In sum, the trial court granted partial summary disposition for both Anglers and RHU D with respect to their breach of contract claims and also with respect to Oakridge's counterclaim for breach of contract.

[1] Russ used Monsanto's patented Roundup Ready genetically modified seeds, which contain a synthesized gene that makes them resistant to glyphosate.

The trial court thereafter conducted a bench trial on plaintiffs' claims for tortious interference with a business relationship or expectancy predicated on Russ's decision to spray the properties in November 2009, and decided that issue in favor of plaintiffs. Russ now challenges that decision. We review a trial court's findings of fact at a bench trial for clear error and review the court's conclusions of law de novo. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Dalley v Dykema Gossett*, 287 Mich App 296, 323; 788 NW2d 679 (2010), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). The party asserting a claim of tortuous interference "must establish that the interference was improper. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, *or* (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship." *Id*. (Emphasis added). Thus, plaintiffs must show that Russ acted with the improper motive of seeking to interfere with plaintiffs' business relationship with Berville Farms.

We begin our analysis by noting that it is clear from the record that all events forming the basis of plaintiff's claim occurred within the 180 day timeframe set forth in the lease agreement. In its findings of fact, the trial court stated:

> Berville grows pumpkins and entered into contracts with Kroger and other retailers. *Sometime between July 2009 and October 2009, Russ became aware that the subject properties were going to be leased to Berville in 2010. Therefore, he was aware of the plaintiffs' business expectation with respect to Berville at the time that he instructed Knust to spray all of the subject properties.* His instruction as made in his individual capacity, rather than as the agent of Oakridge. Russ also knew that Berville intended to plant vegetables. Notwithstanding, Knust sprayed the properties in mid-November with Pursuit, an herbicide that was dangerous for vegetable crops. Although no Pursuit was subsequently found in soil samples, DeBlouw terminated the leasing arrangement since he was not certain that that [sic] other harmful chemicals had not been sprayed on the land and did not want to risk farming the properties. Had Berville farmed the land, it would have paid an incentive to plaintiffs. (Emphasis added.)

Clearly, the trial court found there was ample evidence to support the contention that upon learning that plaintiff intended to terminate the lease, Russ intentionally sprayed the properties to interfere with Berville decision to enter into a lease with plaintiff. And, after losing the prospective tenant, plaintiff was left with no other economic option other than to continue the lease with Oakridge.

Alvin Ferguson testified that in August 2009, Russ approached Ferguson to inquire about trading farmland. Ferguson agreed that Russ must have been aware that DeMil intended to lease the Montgomery/Hough road property to DeBlouw for the 2010 crop year. In fact, Russ called Ferguson during late harvest to complain that DeMil intended to lease property to Berville Farms because DeBlouw would pay $200 an acre, $50 more per acre than Oakridge paid.

Ferguson testified that in November 2009, he saw tracks across the field at the Montgomery/Hough Road, indicating that someone had sprayed the property. Ferguson did not expect to see spraying in the field because the field was "clean for weeds. While a farmer might spray glyphosate to kill weeds, Ferguson opined that the field did not require spraying because there were no weeds.

DeMil testified that Berville Farms intended to grow pumpkins on the land. DeMil rented farmland to DeBlouw and other vegetable farmers for a higher rate, $200 for tile land and $150 for non-tile land, because Russ determined that vegetables absorb more minerals from the soil than grain crops, and vegetable farming involves packing the soil more tightly. Berville's incentive rate was 25 percent. Berville Farms was willing to pay these rates. DeMil informed Russ of his plan to lease the properties to Berville Farms, soon after DeMil entered into the agreement with Berville Farms. DeMil did not "exactly" recall having a conversation with Russ, but DeMil was certain that Russ was aware of the agreement, and that Russ was unhappy about it. Ferguson contacted DeMil about DeMil's lease agreements with Berville Farms. DeMil told Ferguson that he was leasing to Berville Farms because he received a higher rent payment from vegetable farmers. DeMil stated that his business relationships with Russ soured because Russ opposed DeMil's business with Berville Farms. DeMil stated that Russ "believed, in his mind, that he was going to rent it no matter what."

DeMil testified that DeBlouw contacted him after learning that Russ sprayed something on the properties that would harm the vegetable crop. DeMil did not know what had been sprayed on the soil, but he suspected it was Pursuit. DeMil specifically requested soil testing for the presence of Pursuit. Only one sample from one field was tested. DeMil testified that the laboratory tests were not conclusive, but something had been sprayed on the soil. DeMil stated, "I don't know what he did, but based on his actions, here's what chased my tenant away, that's for sure."

DeMil testified that he and Russ met at a golf course for a meeting in late 2009. DeMil tried to discuss Russ's unpaid rent, which caused Russ to become irritated. DeMil stated that Russ "was madder than a wet hen, and he was just you'll never raise pumpkins out there, you'll never put vegetables on there, I put Pursuit on there and he was ranting and raving about it, and he was redder than meat." DeMil testified as follows:

> *Q.* What would prompt Mr. Russ to make those statements to you about not being able to raise vegetables on the property the next year?
>
> *A.* Because he wanted to work it.
>
> *Q.* And how would he know that pumpkins or vegetables were going to be raised on the property the next year?

> *A.* Because I imagine Butch told him, and I told him that I was going to rent it to Butch he was going to put vegetables on it. Butch and him, Butch him [sic] owned property together, as well, and they talk, you know. You know, I mean they have other operations going as well between those two.

DeMil admitted that he did not see anyone spraying the property, but afterward he saw tracks in the field. DeMil believed that Russ maliciously sprayed the soil to force DeMil out of the lease with Berville so that the property would be available to Russ.

DeBlouw testified that Russ knew in June, July, or August 2009 that Berville intended to rent the property. In late October, DeBlouw heard rumors that Knust had been spraying the properties. DeBlouw also learned that the property had been sprayed from several messages on his cell phone sometime after November 15, 2009. He stated that several types of chemicals could adversely affect his vegetable crop. He passed on renting the property for failure to "get a clean bill of health for the land." There were "a thousand chemicals" that could harm his crop, and he could not afford to test for everything, so he was "totally convinced that my crop would be hit."

Russ testified that he planned to plant corn in the 2010 crop year, having received no written notice of termination prior to December 31, 2009. In August 2009, DeMil told him that DeMil could lease the subject properties to Berville Farms for $50 more an acre than Oakridge paid. Russ responded that he and DeMil already had an agreement, and that he expected DeMil to honor the agreement. DeMil "didn't say too much" in response. A few weeks later, DeMil broached the subject again. Russ responded by accusing DeMil of betraying their friendship, going back on his word, and trying to "pimp [Russ] for another 50 bucks later." Russ denied spraying Pursuit on any of the parcels and denied telling anyone that he would do so. He denied knowing as early as August 2009 that he did not have the right to farm the properties, though he acknowledged that he testified in his deposition that DeMil told him in the fall of 2009 that he could not rent Anglers for the 2010 crop year.

Russ testified that he instructed Knust to spray the properties with glyphosate in November 2009. He denied that the purpose of the spraying was to scare DeBlouw out of renting the fields, leaving them available for Oakridge in the 2010 crop year. Russ stated that the fields were sprayed with glyphosate because weeds were growing. He was certain that no other herbicide was used because glyphosate was the only herbicide he used.

The trial court, in concluding "Russ did not have a legitimate reason for ordering the spraying since he knew when he gave the order that he would not be leasing the properties for the 2010 crop year" made clear credibility determinations. The trial court clearly did not believe Russ's testimony. "[Q]uestions of credibility and intent are properly resolved by the trier of fact." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). As the trier of fact, the judge could "weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences." *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983).

Plaintiffs offered evidence that Russ made threats to cause DeMil and DeBlouw to believe that he intended to apply Pursuit to the property or that he had done so already. DeMil

testified that Russ was enraged when they saw each other at their meeting at the golf course, and that Russ angrily threatened him by warning that "you'll never raise pumpkins out there, you'll never put vegetables on there, I put Pursuit on there[.]" Russ's threat was corroborated by evidence that track marks were observed on the property consistent with spraying. Russ testified that he sprayed only glyphosate on the property, but Ferguson testified that there was no need for glyphosate because the fields were clear of weeds. This evidence supports a finding that Russ conducted the spraying in order to cause enough doubt and suspicion in DeBlouw's mind that DeBlouw would decide not to risk planting vegetables on the property, even if he had no proof that Pursuit was present. DeBlouw testified that numerous other herbicides could harm a vegetable crop, and he could not afford to test for everything. Additionally, Russ had a motive to interfere. Russ argues that using Pursuit on the property would not benefit Oakridge, even if plaintiffs agreed to lease the property to Oakridge, because Pursuit would jeopardize Oakridge's 2010 corn crop. However, Oakridge could benefit if Russ did not use Pursuit, but scared away DeBlouw with his threats and warnings. Moreover, Russ clearly became hostile toward DeMil because Russ believed Oakridge was entitled to farm the properties in 2010.

Furthermore, contrary to the assertions by defendant on appeal, this contractual right to carry-over was limited by the option to terminate within 180 days prior to the end of the lease term. Moreover, such an argument ignores the fact that tortious interference with a business expectancy may be proven by showing a per se wrongful act *or* the intentional doing of a lawful act with malice. The trial court's findings of fact and conclusions of law indicate that Russ's revenge and personal animus were the motives for his actions. That he had the legal right to occupy the land at that time did not give Russ the authority to destroy – or threaten to destroy – the land for future users, or to interfere with plaintiff's ability to exercise the termination clause of the lease.

Accordingly, the trial court correctly concluded that plaintiff proved the elements necessary to sustain a verdict for the claim of tortuous interference with a business relationship. *Dalley*, 287 Mich App at 323. We therefore affirm the trial court.

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly